Segregation

ARGUMENT ON BEHALF OF APPELLEES IN BRIGGS v. ELLIOTT

By

John W. Davis

Delivered Before the Supreme Court
of the United States on December 7, 1953

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"Mr. Davis: May it please the Court, I suppose there are few invitations less welcome in an advocate's life than to be asked to reargue a case on which he has once spent himself, and it is particularly unwelcome when the order for reargument gives him no indication whatever of the topics in which the Court may be interested. Therefore, I want at the outset to tender the Court my thanks and, I think, the thanks of my colleagues on both sides of the desk for the guidance you have given us by the series of questions to which you have asked us to devote our attention. In what I shall have to say, I hope to indicate the answers which, for our part, we give to each one of them.

At the previous hearing of this case I think all counsel on both sides of the controversy, and in every case, realizing that it was an act of mercy, and perhaps even of piety, not to increase the reading matter that comes to this Court, briefed the case in rather concise fashion. An effort was apparent, and I am sure I shared it, to condense the controversy to the smallest compass it would bear. Now, for a rough guess I should think the order for reargument has contributed

somewhere between 1,500 and 2,000 pages to the possible entertainment, if not the illumination, of the Court. But I trust the Court will not hold counsel responsible for this proliferation.

Most of us have supported our answers to the Court's questions by appendices addressed to the action of Congress, to the action of the ratifying States, and in our particular case, to the history of the question within the State of South Carolina.

In view of the fact that his Honor, the Chief Justice, was not on the bench at the time of the other argument, perhaps I should outline the present posture of the South Carolina case of Briggs and Elliott. It was brought, as Mr. Robinson correctly stated, by infant Negro children in Clarendon County School District No. 22 (which, by a subsequent redistricting, became a part of District No. 1), by their parents and next friends, asserting that they were denied the equal protection of the laws on two grounds: First, that Section 7 of Article XI of the Constitution of South Carolina forbade integrated schools, commanded that the white and colored races should be taught in separate schools, and that the statute, in pursuance of that Constitution, Section 5277 of their code, made a similar provision, and that both were in violation of the Fourteenth Amendment to the Constitution of the United States per se. Second, that, be that as it may, inequalities existed between the educational facilities furnished to the white and black children, to the detriment of the black. The State of South Carolina came in and admitted that those inequalities existed, and declared its intention to remove them as promptly as possible. Evidence was taken. The District

Court decreed that the Constitution and statute of South Carolina did not violate the Amendment, found the existence of the admitted inequality, enjoined its immediate removal, and gave to the State of South Carolina the period of six months to report what steps had been taken to implement that decree.

At the end of that time a report came in which came to this Court and was returned to the District Court, and upon a second hearing, a further report came in. It was made to appear that the promise of the State of South Carolina to remove this inequality was no empty promise; that it had authorized—its legislature had authorized—a bond issue of $75 million to equalize the physical facilities of the schools, supported by a 3 per cent sales tax; that the curricula had been equalized, the pay of teachers had been equalized, and transportation had been provided for children, white and black. The accuracy of those reports being admitted—and I am merely summarizing them—the court below held that it was clear that by the first of September, 1952, the inequalities had disappeared. It then entered an order enjoining the further removal of such inequalities as might have existed, and declared the Constitution and the statute to be valid and non-violative of the Fourteenth Amendment.

We have in South Carolina a case, as Mr. Marshall has so positively admitted, with no remaining question of inequality at all, and the naked question is whether a separation of the races in the primary and secondary schools, which are the subject of this particular case, is of itself per se a violation of the Fourteenth Amendment.

Now, turning to our answers, let me state what we say as to each one of them. The first question was: What

evidence is there that the Congress which submitted and the State legislatures which ratified the Fourteenth Amendment contemplated or did not contemplate, understood or did not understand, that it would abolish segregation in public schools? We answer: The overwhelming preponderance of the evidence demonstrates that the Congress which submitted and the State legislatures which ratified the Fourteenth Amendment did not contemplate and did not understand that it would abolish segregation in public schools. In the time that is afforded, I hope to vindicate that categorical reply.

Our friends, the appellants, take an entirely contrary view, and they take it, in part, on the same historical testimony. Certain fallacies underlie, I think, their course in reaching that conclusion. Some of them are apparent in their brief, but I have not found that they touched upon them in oral argument.

The first fallacy which appears in their brief, in their recounting of history, is the assumption, wholly unwarranted, as I think, that the anti-slavery pre-Civil War crusade, the abolitionist crusade, was directed not only against slavery but against segregation in schools. I do not think that thesis can be sustained, for the thrust and movement of the abolitionist crusade was directed toward one thing, and one thing only—the abolition of the institution of slavery. And from that nothing can be deduced which is helpful to the Court in its study of this section of history.

I think the next unjustified assumption, and again I am referring to my adversaries' brief and not to their oral presentation, was that the radical Republicans controlled the action of the 39th Congress. That again is an unwarranted

assumption. The radicals might force the pace; they were rarely able to call the tune. The 39th Congress never went as far as some of the radical Republicans wished it to go and, perhaps, there has never been a Congress in which the debates furnished less real pablum on which history might feed. It was what Claude Bowers calls in his book 'The Tragic Era'—well-named. Flames of partisan passion were still burning over the ashes of the Civil War.

In the Senate there were such men as Sumner, who made a life-long crusade in favor of mixed racial schools. From the time that he was counsel for the plaintiff in Roberts v. Boston in '49, he never missed an opportunity to bring the question forward, and never succeeded in having non-segregation enacted into law, except by the legislature of Massachusetts in 1855. There were men who stood with Sumner, for example, his colleague, Henry Wilson of Massachusetts. And on the other side equally capable men like Cowan of Pennsylvania, and Garrett Davis of Kentucky, and others, resented all of the Civil War reconstruction legislation, and whenever they had an opportunity to attack it, painted it in the blackest colors that they could devise.

In the House, Thaddeus Stevens, called by historians perhaps the most unlovely character in American history, was more concerned to humiliate the aristocrats of the South, as he called them, than to preserve the rights of the Negro. His policy was confiscation of all estates over $10,000 and two hundred acres, of which 40 acres should be given to every adult Negro, and the remainder should be sold to pay the expenses of the war. He wanted the South to come to Washington as suppliants in sackcloth and ashes. He had his echoes. On the other side there were resisters

like Rogers of New Jersey, a Democrat from New Jersey, who never missed an opportunity to criticize every one of the bills that was presented on the ground that it would forbid segregated schools. That complaint came from Rogers almost as regularly as the contrary view came from Sumner.

Now, if I gather my friends' position, both in brief and argument, they hope from the debates of such a Congress to distill clear, specific evidence of Congressional intent. I do not think that is possible; but there is a source from which Congressional intent can be gathered, far more reliable, far less open to challenge by anyone. What did the Congress do? And when we study the legislation enacted by Congress immediately before, immediately after, and during the period of the discussion of the Fourteenth Amendment, there can be no question left that Congress did not intend by the Fourteenth Amendment to deal with the question of mixed or segregated schools.

There is another fallacy in the presentation of the case by the appellants. They take for granted that if they can quote any Senator, Congressman, or other character in favor of racial equality, they can count him down in the column of those who were opposed to segregated schools, which is a clear nonsequitur and a begging of the question.

We are not concerned here with the mandate of the Constitution that the Negro, as well as the white, shall enjoy the equal protection of the laws. The question with which Your Honors are confronted is: Is segregation in schools a denial of equality where the segregation runs against one race as well as against the other, and where in the eye of the law no difference between the educational facilities of the two classes can be discerned?

Now, I think those remarks sum up most of what I care to say by way of direct reply to the argument of the appellants.

There is a third point of view presented to Your Honors. We say the intent of Congress was clear not to enter this field. We say the intent of the ratifying States was equally clear, at least as to the majority of them, not to enter this field. The Attorney General is present, acceding to the invitation of the Court, with a brief, and a very large appendix reciting the history of the legislation. He reaches the conclusion, or those who speak for him—I am not speaking in the personal sense but only of the office—he reaches the conclusion, as stated in his brief, that historical facts—I am having some trouble with my own chirography here and I wish my quotation to be exact—'the historical facts are too equivocal and inconclusive to formulate a solid basis on which this Court can determine the application of the amendment to the question of school segregation as it exists today.' After so prolonged a study as has evidently been made, that does seem rather a lame and impotent conclusion, not calculated to be of a great deal of help to the Court; and I think the cause of that despair on the part of the learned Attorney General and his aids is that they have fallen into the same fallacy into which the appellants have fallen. They endeavor by collating all that was said on either side whenever the question raged—and it was not a single instance—they hope out of that to distill some attar that will exhibit what can fairly be called the Congressional intent. It is no wonder that, having plunged into that Serbonian bog, they are in a state of more or less despair when they are able to emerge.

Now, Your Honors then are presented with this: We say there is no warrant for the assertion that the Fourteenth Amendment dealt with the school question. The appellants say that from the debates in Congress it is perfectly evident that the Congress wanted to deal with the school question. And the Attorney General, as a friend of the Court, says he does not know which is correct. So Your Honors are afforded a reasonable field for selection.

Now, we say that, whatsoever may have been said in debate—and there is not an angle of this case that would not find, if that were the decisive question, support in what some person might have said at some time—Congress by its action demonstrated beyond peradventure what field it intended to occupy.

I hoped at one time that it would be possible to take up each action of Congress upon which we rely and vindicate our interpretation of it. I see now that I underestimated the time that would be at my disposal, or overestimated my power of delivery. I shall have to speak more or less in words of catalog and leave to our brief and to our appendices confirmation of the relevancy of these incidents.

The 39th Congress passed the First Supplemental Freedmen's Bureau Bill, giving the Freedmen's Bureau power to buy sites and buildings for schools for freedmen, refugees, and their children; and, of course, the freedmen and the refugees were of the colored race. There was provision that if certain cataloged rights were denied, military protection should be given. What was that catalog? To make and enforce contracts, sue, be sued, be a party and give evidence, inherit, purchase or dispose of real or personal property; have full and equal benefit of all laws and proceedings for

the security of person and estate, and be subject to like punishments, pains and penalties as with others, and none besides. What did the Freedmen's Bureau do? It was the pet and child of Congress and, acting under its constant supervision, it installed separate schools throughout the South, so separate indeed that history records one complaint by the City of Charleston that they had seized, occupied and taken over all the school buildings in that city, filled them with their Negro wards, and the white children no longer had any buildings to which to resort.

In the Civil Rights Act of 1866, the rights to be protected were cataloged almost in the identical language of the Freedmen's Bureau Bill, the difference being that the Freedmen's Bureau Bill ran only in those States in which the process of the courts had been interrupted—which was a euphemism meaning those States that had been occupied by the Confederate and Federal armies—and the Civil Rights Act of 1866 was designed to be nation-wide. It is not surprising that its language conformed to the language of the Freedmen's Bureau. They were both introduced at the same time by Senator Trumbull, the chairman of the Judiciary Committee of the Senate, and they made their way through Congress in much the same fashion.

After the Civil Rights Act of 1866 had passed the Senate, it went to the House for consideration. There it was introduced, sponsored, and discussed by Congressman James Wilson of Iowa, who was chairman of the Judiciary Committee. When Brother Rogers made his usual complaint that it would do away with separate schools, Wilson said on the floor that the Act did not mean that their children should attend the same schools, and, in effect, that it was

absurd so to interpret it. Now, the pertinency of that assurance is due to the connection which counsel has stated between the Civil Rights Act and the Fourteenth Amendment. It was the constant claim of those who favored the Fourteenth Amendment, Stevens and Sumner both speaking of it, that it was intended to make the Civil Rights Act not only constitutional (and so to quiet Congressman John Bingham's doubt and conscience) but irrepealable so that, as Stevens said, whenever the Democrats and their Copperhead allies came back to Congress, they would not be able to repeal it.

I will pass over, for the moment, some other legislation, which I will come back to, that occurred in the 39th Congress.

We come to the reinstatement of the seceded States. Congress passed an act by virtue of which they might, in compliance, send their Senators and Congressmen back. Now, in the 39th Congress, Sumner had put forward his prescription for their readmission. He had five headings for it, of which the fourth was this: That the seceding States, if they wished to return, should adopt constitutions, which among other things, would provide for the organization of an educational system for the equal benefit of all, without distinction of color or race. The Reconstruction Act was adopted in the succeeding Congress and it called for a catalog of performances to be carried out by the States desiring readmission. Did they say anything about Sumner's educational plank? Not a word. Was any requirement made of the State as to educational provision? None whatever.

When they came to readmit the State of Arkansas, Senator Drake of Missouri offered an amendment in which he provided that the constitution of the petitioning State should provide no denial of the elective franchise or *any other right*. He offered that as an amendment to the bill admitting the State of Arkansas. Controversy arose as to the meaning of 'any other right.' Then it was asserted that there would enter the question of schools. It was stricken out, and the Drake Amendment adopted without it—and Senator Frelinghuysen, who had been a member of the 39th Congress and was later to act as Senate floor leader for the Civil Rights Act of 1875, said that neither the Drake Amendment nor the Fourteenth Amendment touched the question of separate schools. That is one time when I think it is proper to quote from a debate.

There came then the amnesty bill amendments. Congress passed an amnesty bill. When it was before the Senate, Sumner offered his supplemental Civil Rights Bill, which provided expressly for mixed schools. The Judiciary Committee twice reported it adversely, and Sumner flanked them by offering it then as an amendment to the amnesty bill. In that form it was debated and, finally, a vote was taken which was 28 to 28, and the Vice President broke the tie in Sumner's favor. It was the high-water mark of his achievement.

The amnesty bill, so amended, failed of passage in the Senate, where it needed a two-thirds vote under the terms of the Fourteenth Amendment. It failed of passage in the Senate and the Senate did nothing more with it. Then it went to the House, and the House failed to pass it. The

weight of the Sumner Amendment was too much for the bill to carry.

Bills to require mixed schools in the District of Columbia were defeated in the 41st and the 42nd Congresses.

Then came the Civil Rights Act of 1875, which was passed only after the Kellogg Amendment, striking out the reference to schools, churches, cemeteries, and juries, was adopted.

In 1862 Congress had set up its first school for Negroes in the District of Columbia on a segregated basis. In 1864 it dealt with that question again on a segregated basis. In 1866, the 39th Congress made a donation of certain lots to be given to schools for Negroes only. It passed a second Act in the same Congress dealing with the distribution of funds between the Negro and the white schools. In 1868 it dealt with the question again on the segregated basis, and has so continued to this day.

I know that Your Honors are shortly going to hear a case which challenges the validity of those statutes; and, be they valid or invalid, for the purpose of my present argument it is immaterial. They are enough to show what the sentiment of Congress was, what its determination was on this specific question. And it is no answer to say that Congress is not controlled by the Fourteenth Amendment. Of course, it is not; but is it conceivable to any man that Congress would submit to the States an amendment destroying their right to segregated schools and would contemporaneously and continuously institute a regime of segregated schools in the District of Columbia? I should think that a Congressman who was responsible for submitting to the States an amendment shearing them of such power

would have quite an explanation to make when he got home, if he said he had done exactly the reverse in the District of Columbia.

Then it is suggested in the brief for the learned Attorney General—and I think similar comment, perhaps, by the appellants—that these two instances in the 39th Congress, these two legislative recognitions of separate schools in the District, which were passed when the Fourteenth Amendment was taking form and substance, were mere routine performances; that they came very late in the Congressional session; and that they were not even honored by having any debate. Apparently, to have a law which is really to be recognized as a Congressional deliverance, it must come early in the session, it must be debated, and the mere fact that it is passed by unanimous consent and without objection more or less disparages its importance as an historical incident. I have never, that I can recall, heard a similar yardstick applied to Congressional action.

There isn't time to go over the States. They are covered by our appendix and these other appendices. We classify them, too.

We say that there are nine States that never had segregated schools. These were States in the northern tier, where there weren't enough Negroes to make it worthwhile. There were five States—I am speaking now of the 37 States that were then in existence—there were about five States where there had been segregation and they contemporaneously discontinued it. Those were Connecticut, Louisiana, Michigan, Florida and South Carolina. Three of those States returned to segregation as soon as the reconstruction period was over.

There were four States that had segregation—I am speaking now of the period from '66 when the Amendment was submitted to '68 when it was proclaimed—there were four States with segregation who refused to ratify and continued segregation. They were California, Kentucky, Maryland and Delaware. Delaware didn't ratify it until 1901.

There were two border States that had segregation both before and after ratification, and have continued it to this day. They are Missouri and West Virginia.

There were nine Northern States that either continued segregation they already had or established it immediately after the ratification of the Fourteenth Amendment—Illinois, Indiana, Kansas, Nevada, New Jersey, New York, Ohio, Oregon and Pennsylvania.

And then—and I can find no evidence that my friends appreciate the significance of this fact—of the reconstructed States who ratified in order to get their delegates, their Congressmen and Senators, back to Washington, eight reconstruction States, by the same reconstruction legislatures, Republican controlled—the same legislatures which ratified the Fourteenth Amendment— passed statutes continuing or immediately establishing segregated schools. I regard that as a fact of great significance. If there was any place where the Fourteenth Amendment and its sponsors would have blown the bugle for mixed schools and asserted that the Fourteenth Amendment had settled the question, surely it would have been in those eight States under reconstruction legislatures, sympathetic to the party which was responsible for the submission of the Fourteenth Amendment.

Now the appellants say in their brief that three fourths of the ratifying States gave evidence that they thought the

Fourteenth Amendment had abolished segregated schools. I can find in the history as detailed by all of these appendices no warrant whatever for any such assertion, for any such proportion of non-concurring States. That is before Your Honors in the appendices, and you must, between the three points of view that I have indicated, make your selection.

The second question: If neither the Congress in submitting nor the States in ratifying the Fourteenth Amendment understood that compliance with it would require the immediate abolition of segregation in public schools, was it nevertheless the understanding of the framers of the Amendment (a) that future Congresses might, in the exercise of their power under Section 5 of the Amendment, abolish segregation, or (b), that it would be within the judicial power, in light of future conditions, to construe the Amendment as abolishing such segregation of its own force?

And to that we answer (a): It was not the understanding of the framers of the Amendment that future Congresses might, in the exercise of their power under Section 5 of the Amendment, abolish segregation in public schools.

And (b): It was not the understanding of the framers of the Amendment that it would be within the judicial power, in light of future conditions, to construe the Amendment as abolishing segregation in public schools of its own force.

It was not the understanding of the framers that Congress might, in the exercise of their power under Section 5 of the Amendment, abolish segregation. And if we are right in the initial proposition that neither Congress nor the States thought the Amendment was dealing with the question of segregated schools, obviously Section 5 of

the Amendment could not give Congress more power than the Amendment itself had originally embraced. But the power given to Congress, we had noted in Section 5, is the power—I thought I had the exact language— 'to enforce the provisions of this article'. And Section 5 is not a Trojan horse which opened to Congress a wide field in which Congress might expand the boundaries of the article itself.

Mr. Justice Jackson: Mr. Davis, would not the necessary and proper clause apply to the Amendment as well as to the enumerated powers of the instrument itself? In other words, if Congress should say that in order to accomplish the purposes of equality in other fields the abolition of segregation was necessary, as a necessary and proper measure, would that not come under it, or might it not come under the necessary and proper clause? In other words, I mean is it limited to just what is given in the Amendment or does the necessary and proper clause follow into the amendments?

Mr. Davis: Well, if you can imagine a necessary and proper clause which would enforce the provisions of this article by dealing with matter which is not within the scope of the article itself, which I think is a contradiction in terms, that is a paradox: Congress could do what the Amendment did not warrant under the guise of enforcing the Amendment.

Mr. Justice Frankfurter: But you can look to the necessary and proper clause to determine whether it is something appropriate within the Amendment.

Mr. Davis: Quite so. That is, if you choose, a premonitory clause, related to Congressional wisdom and policy,

and to the judicial power. In answer to that question, we say that to interpret the Amendment as including something that it does not include is not to interpret the Amendment but is to amend the Amendment, which is beyond the power of the Court.

The third question: On the assumption that the answers to questions 2 (a) and (b) do not dispose of the issue, is it within the judicial power, in construing the Amendment, to abolish segregation in the public schools? And we answer: It is not within the judicial power to construe the Fourteenth Amendment adversely to the understanding of its framers as abolishing segregation in the public schools. Before we answer, we preface that with an expression of the extreme difficulty we have in making the initial assumption on which that question is based, for in our humble judgment the answers to questions 1 and 2 (a) and (b) do dispose of the issue in this case and dispose of it in the clearest and most emphatic manner.

We go on in our answer: Moreover, if in construing the Amendment the principle of stare decisis is applied, controlling precedents preclude a construction which would abolish segregation in the public schools. Now we are cognizant of what this Court has said, not once but several times, and what some of us have heard outside the Court as to the scope of stare decisis in constitutional matters; and it has been accepted that, where there is a pronounced dissent from previous opinions in constitutional matter, mere difficulty in amendment leads the Court to bow to that change of opinion more than it would in matters of purely private rights. But be that doctrine what it may, somewhere, sometime, to every principle comes a moment of repose when the decision has been so often announced, so confidently relied

upon, so long continued, that it passes the limits of judicial discretion and disturbance.

That is the opinion which we held when we filed our former brief in this case. We relied on the fact that this Court had not once but seven times, I think it is, pronounced in favor of the separate but equal doctrine. We relied on the fact that the courts of last appeal of some sixteen or eighteen States have passed upon the validity of the separate but equal doctrine vis-à-vis the Fourteenth Amendment. We relied on the fact that Congress has continuously since 1862 segregated its schools in the District of Columbia. We relied on the fact that 23 of the ratifying States—I think my figures are right, I am not sure—had by legislative action evinced their conviction that the Fourteenth Amendment was not offended by segregation. And we said in effect—and I am bold enough to repeat it here now—that, in the language of Judge Parker in his opinion below, after that had been the consistent history for over three quarters of a century, it was late indeed in the day to disturb it on any theoretical or sociological basis. We stand on that proposition.

Then we go on: Even if the principle of stare decisis and controlling precedents be denied, and the effect of the Amendment upon public school segregation be examined de novo, the doctrine of reasonable classification would protect this doctrine from any charge that is brought against it.

In Clarendon School District No. 1 in South Carolina, with which this case alone is concerned, there were, in the last report that got into this record, something over a year or a year and a half ago, 2,799 registered Negro children of school age. There were 295 whites. And the State

has now provided those 2,800 Negro children with schools as good in every particular. In fact, because of their being newer, they may even be better. There are good teachers and the same curriculum as in the schools for the 295 whites.

Who is going to disturb that situation? If they were to be reassorted or commingled, who knows how that could best be done? If it is done on a mathematical basis, with 30 children to a room as a maximum, which I believe is the accepted standard in pedagogy, you would have 27 Negro children and 3 whites in one school room. Would that make the children any happier? Would they learn any more quickly? Would their lives be more serene?

Children of that age are not the most considerate animals in the world, as we all know. Would the terrible psychological disaster being wrought, according to some of these witnesses, to the colored child be removed if he had three white children sitting somewhere in the same school room? Would white children be prevented from getting a distorted idea of racial relations if they sat with 27 Negro children? I have posed that question because it is one that cannot be overlooked.

You say that is racism. Well, it is not racism to recognize that for 60 centuries or more humanity has been discussing questions of race and race tension. Say that we make special provisions for the aboriginal Indian population of this country. It is not racism. Say that 29 States have miscegenation statutes now in force which they believe are of beneficial protection to both races. And what of racial distinctions in our immigration and naturalization laws? Disraeli said, 'No man will treat with indifference the prin-

ciple of race. It is the key to history.' And it is not necessary to enter into any comparison of faculties or possibilities. You recognize differences which race implants in the human animal.

Now, I want to spend some time on the fourth and fifth questions. They give us little disturbance, and I don't feel they will greatly disturb the Court.

As to the question of the right of the Court to postpone the remedy, we think that inheres in every court of equity, and there has been no question about it as to power.

The fifth question is whether the Court should formulate a decree. We find nothing here on which this Court could formulate a decree. Nor do we think the Court below has any power to formulate a decree reciting in what manner these schools are to be altered, if at all, and what course the State of South Carolina shall take concerning it. Your Honors do not sit, and cannot sit, as a glorified Board of Education for the State of South Carolina or any other State. Neither can the District Court.

Assuming (in the language of the old treaties about war, 'it is not to be expected and may God forbid') that the Court should find that the Statutes of the State of South Carolina violate the Constitution, it can so declare. If it should find that inequality is being practiced in the schools, it can enjoin its continuance. Neither this Court nor any other court, I respectfully submit, can sit in the chairs of the legislature of South Carolina and mold its educational system; and if it is found to be in its present form unacceptable, the State of South Carolina must devise the alternative. It establishes the schools, it pays the funds, and it has the sole power to educate its citizens. What it would do under

these adverse circumstances, I don't know. I do know, if the testimony is to be believed, that the result would not be pleasing.

Let me say this for the State of South Carolina. It does not come here, as Thad Stevens would have wished, in sackcloth and ashes. It believes that its legislation is not offensive to the Constitution of the United States. It is confident of its good faith and intention to produce equality for all of its children of whatever race or color. It is convinced that the happiness, the progress and the welfare of these children is best promoted in segregated schools, and it thinks it a thousand pities that, by this controversy, there should be urged the return to an experiment which gives no more promise of success today than when it was written into their Constitution during what we have called 'the tragic era'.

I am reminded—and I hope it won't be treated as a reflection on anybody—of Aesop's fable of the dog and the meat: The dog, with a fine piece of meat in his mouth, crossed a bridge and saw the shadow of the meat in the stream and plunged for it, and lost both substance and shadow.

Here is equal education, not promised, not prophesied, but present. Shall it be thrown away on some fancied question of racial prestige?

It is not my part to offer advice to the appellants and their supporters or sympathizers, and certainly not to the learned counsel. No doubt they think what they propose is best, and I do not challenge their sincerity in any particular, but I entreat them to remember the age-old motto that 'the best is often the enemy of the good.' "

S.C.
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Davis

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Argument on behalf of appellees
in Briggs v. Elliott.

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